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In the Supreme Court of the United States

OCTOBER TERM, 1965

No. 898

IMMIGRATION AND NATURALIZATION
SERVICE,

Petitioner,

v.

GIUSEPPE ERRICO,

Respondent.

BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

OPINIONS BELOW

The majority and concurring opinions in the court of appeals are reported at 349 F.2d 541.

JURISDICTION

This court has jurisdiction under 28 U.S.C. 1254 (1). The petition for certiorari was received on January 12, 1966.

QUESTION PRESENTED

Respondent agrees with the statement of the question presented in the petition for certiorari.

STATUTE INVOLVED

Section 241 (f) of the Immigration and Nationality Act, 8 U.S.C. 1251 (f), provides:

The provisions of this section relating to the deportation of aliens within the United States on the ground that they were excludable at the time of entry as aliens who have sought to procure, or have procured visas or other documentation, or entry into the United States by fraud or misrepresentation shall not apply to an alien otherwise admissible at the time of entry who is the spouse, parent, or a child of a United States citizen or of an alien lawfully admitted for permanent residence.

STATEMENT OF FACTS

Respondent accepts petitioner's statement of facts.

REASONS FOR DENYING THE WRIT

The government bases its argument for granting the writ of certiorari largely on the conflict between the decision of Court of Appeals for the Ninth Circuit in the instant case, and that of the Court of Appeals for the Second Circuit in *Scott v. Immigration and Naturalization Service*, 350 F.2d 279. The government has gone

so far as to support the petition for writ of certiorari in the *Scott* case.

However, *Errico* and *Scott* are the only court of appeals cases interpreting Section 241 (f) in spite of the fact that Section 241 (f) was enacted on September 26, 1961. Respondent suggests that the issue in this case is not substantial enough to warrant review by this court at this time.

It must be observed that where the Immigration and Naturalization Service has found its strict and harsh administration of the immigration law cramped by court opinion, it is frequently gone back to Congress for an amendment which it finds, for some reason, relatively easy to obtain. Perhaps that will be done in the event the decision in *Errico* is permitted to stand.

Another reason why the Government's Petition for Certiorari seems rather strained is that it has apparently been unable to make up its mind as to its own interpretation of Section 241 (f).

When the proceeding against *Errico* began, a Special Inquiry Officer ruled against him because he was unable to obtain a waiver of lack of documentation and further, that he had no valid immigration visa under Section 212 (a) (20). After the matter had been certified to the Board of Immigration Appeals, the trial attorney's brief dealt only with this issue and did not in any way raise the question of *Errico's* ability to meet the Italian quota.

The Board of Immigration Appeals' opinion does not

even discuss Section 241 (f), and it was not until the matter was briefed and argued in the Ninth Court of Appeals that the Government raised the point that *Errico* could not obtain an immigrant visa because the Italian quota was over-subscribed.

Before the Supreme Court is expected to take up its time in considering the correct interpretation of a statute which has had only two cases decided under it in courts of appeal, surely the United States Government should first be required to make up its mind how it interprets the statute, particularly since in all likelihood it was drafted by attorneys for the Immigration and Naturalization Service.

Finally, respondent believes that the decision of the Ninth Court of Appeals was absolutely correct and that the logic in the opinion is impeccable. As a practicable matter too, the Ninth Circuit's opinion results in carving out an area in which the humanitarian purposes of 241 (f) might be fulfilled, whereas the Government's interpretation would lead to the ridiculous result that 241 (f) would only be applicable if an immigrant fraudulently obtains a visa while at the same time he might have, or in fact did, obtain another visa under another section of the law without fraud.

The Immigration and Nationality Act is a harsh law, often administered in a harsh and oppressive manner. From time to time the Congress has felt it advisable to introduce provisions to soften this law and surely 241 (f) was such an amendment. But rather than accepting 241 (f) at its face value, the Immigration and Natural-

ization Service, in line with its usual policy, persists in attempting to so interpret it as to make it utterly meaningless. Respondent feels that the argument set forth in the Court of Appeals' opinion in his case is ample refutation of the Government's position as stated in its Petition for Certiorari. Particularly, the Government persists in identifying 241 (f) as having been enacted in the 1957 Act. As the Court of Appeals correctly discerns, Section 7 of the 1957 Act was repealed in 1961 and was expressly conditioned upon the consent of the Attorney General in the granting of relief to an alien who misrepresented his qualifications for admission. The present Section 241 (f) is in no way conditioned for its operation upon the discretion of the Attorney General, and considerably broadens the scope of relief available to an alien who made misrepresentations. To interpret the words "otherwise admissible" to mean that the alien must have been qualified to enter the country under a quota (which would have made his misrepresentations irrelevant and unnecessary) is to so emasculate this section of the law as to render it a virtual nullity.

CONCLUSION

The Petition for a Writ of Certiorari should be denied. Respondent takes no position with respect to the Petition for Certiorari in the Scott case.

Respectfully submitted,

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FEBRUARY 1966.

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